Inta-Roto, Incorporated *and* Local Union No. 10, International Association of Machinists and Aerospace Workers. Case 5-CA-11576

26 August 1983

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND DENNIS

On 19 May 1982 Administrative Law Judge Thomas A. Ricci issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Respondent filed exceptions and a supporting brief, and the Charging Party filed a brief in answer to the Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs[1] and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge, as modified below, and to adopt his recommended Order as so modified.

We agree with the General Counsel's contentions that the backpay periods commenced on 30 November 1979, the date Maxey and Reszies were discharged, as opposed to 4 and 5 December, as found by the Administrative Law Judge.[3] While the Respondent denied in its answer that the backpay periods commenced on 30 November, it introduced no evidence in support of that denial. It was the Respondent's burden to produce evidence that Maxey and Reszies incurred a willful loss of earnings subsequent to their discharges. Accordingly, as alleged in the amended backpay specification, the amount due Maxey is $7,398.48, plus interest, and the amount due Reszies is $10,666.72, plus interest.

[1] The Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[3] Member Dennis agrees that the backpay period began on 30 November 1979, the date the two strikers were discharged, because the United States Court of Appeals for the Fourth Circuit, in enforcing the Board's Order in the underlying case, 252 NLRB 764 (1980), specifically found substantial evidence in the record to support the Board's application of *Abilities & Goodwill*, 241 NLRB 27 (1979), to the facts of this case. 661 F.2d 922 (1981). In joining her colleagues in this case Member Dennis finds it unnecessary to decide whether a discharged striker should be awarded backpay from the date of discharge without requiring the discharged striker to request reinstatement.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Inta-Roto, Incorporated, Henrico County, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

Substitute the following for the amounts due employees Maxey and Reszies as set out in the Administrative Law Judge's Decision:

Maxey	$ 7,398.48
Reszies	10,666.72

DECISION

STATEMENT OF THE CASE

THOMAS A. RICCI, Administrative Law Judge: This is a backpay proceeding in which a hearing was held on March 4, 1982, in Richmond, Virginia. On September 30, 1980, the National Labor Relations Board issued a Decision, 252 NLRB 764, in which it found that the Respondent here had illegally discharged four employees in violation of Section 8(a)(3) of the Act. Its decision was enforced by the circuit court, and, on October 30, 1981, the Board's Regional Director issued a backpay specification claiming a precise amount of backpay due each of the four discriminatees. Two of these employees involved were removed from this proceeding because of a settlement agreement between the General Counsel and the Respondent. What remains to be decided is what precise amounts are now due R. S. Maxey and H. S. Reszies. Briefs were filed after the close of the hearing by both the General Counsel and the Respondent.

The Questions Presented

The backpay period, as set out in the specifications, for both Maxey and Reszies, spans the period November 30, 1979, to July 18 and 17, 1980, respectively, for Maxey and Reszies, the time when adequate offers of reinstatement were made pursuant to the Board's remedial order. There is no issue as to how much the two men would have earned during the period involved had they not been fired. In part via its answer to the specifications, and in part as spoken during the hearing, the Respondent raises a number of issues which the General Counsel disputes. They are best listed, and clarified, in the Respondent's brief. (1) Does the backpay period start when the Company wrote the discharge letters on November 30, 1979, or when the two men received the written notices on December 4 and 5? (2) Does the fact that in December 1979 the Company offered Christmas hams to all its workers—people then on strike, nonstriking employees, as well as Maxey and Reszies—mean that the backpay period ended when both these men came in and accepted the hams? (3) Did Maxey forfeit all backpay rights because he worked a good part of the time

but did not report his earnings, paid no withholding tax on them, and did not tell the General Counsel about those interim earnings until 2 months before the hearing, when he paid all income tax due the Internal Revenue Service, and did tell the General Counsel about his earnings so that they were then added to the specification? (4) Has the Respondent proved, affirmatively, that Reszies, who had no interim earnings during the 7-1/2 months backpay period, did not make an adequate and reasonable search for work? And, (5) need the Company pay interest now to these men on that part of their gross backpay which would have been deducted from their earnings for Federal and state income taxes, and which therefore they would not have received in their hands anyway?

1. It is a fact that on November 30, 1979, a Friday, the Company wrote letters to both Maxey and Reszies telling them that their jobs had been eliminated; both letters were received in evidence as exhibits. The Respondent's answer to the specifications asserts that Maxey received his discharge notice on December 4, and Reszies on December 5. The General Counsel chose not to question the correctness of these dates as to when the discharge notices first came to the attention of the two employees. I suppose that so long as when a respondent does not dispute a significant factual statement in the specifications, that fact must be accepted as true, the same principle will bind the General Counsel the other way around. Both Maxey and Reszies joined the strike when it started, on about November 30. This means that between that day and when they first learned they had been discharged they were withholding their services because they chose to do so. How can it be held, or even assumed, that they then were making a diligent and reasonable search for work elsewhere?

In arguing that these two men are nevertheless entitled to backpay for the workdays between November 30 and December 4 and 5, the General Counsel relies solely on the fact the Board said, in its unfair labor practice decision, that they were discharged on November 30. Now, while it is true the Company, on its part, revealed its illegal conduct that day, it does not follow from this that the men were anything but self-determined strikers before learning that their jobs no longer existed. In its finding, the Board was not concerned with when any backpay period should start; all it found in these letters was proof of misconduct by the Respondent. That one subject—relevation of intent by the employer—has nothing to do with when the employees were hurt, or prejudiced economically. Insofar as they are concerned, and backpay goes to remedying their hurt, they suffered nothing in the interval.

I shall therefore deduct from their gross backpay the 3 or 4 workdays from November 30, Friday, to December 4 or 5, Monday, Tuesday, and Wednesday. Judging by the undisputed figures in the specifications, these men earned $62.48 a day when they worked. I take it that Maxey is credited in the specifications with Friday, Monday, and Tuesday work, and shall therefore deduct $187.38 from his gross backpay figure. As to Reszies, the amount to be deducted is four workdays—Friday, Monday, Tuesday, and Wednesday—or $249.84.

2. The Respondent's second argument, seemingly aimed at cutting the backpay period off completely, or at least at Christmastime in 1979, really is a two-barreled idea. As it did with respect to all others who worked, or had worked for it, the Company sent letters to Maxey and Reszies on December 14, saying, among other things: ". . . we at Inta-Roto are giving hams as Christmas presents to our employees. We want you to know that, even with the current differences, you are still considered an Inta-Roto employee. You may pick up your ham at Gate 1 on Thursday, December 20 between 1 and 2 p.m." Like everybody else, Maxey and Reszies came and accepted the hams. The Company now characterizes the implication said to arise from this incident in many ways. It says it proves that the men never considered themselves nonemployees at all, that they knew the Company never looked on them as dischargees, that they had jobs waiting for them whenever they were willing to come back to work, etc. No matter how phrased, all this boils down to is either that the letter shows Maxey and Reszies were never fired or that it constitutes an offer of reinstatement. According to the Respondent the letters either obliterate any back liability altogether or at least cut it off from the day the men enjoyed eating the hams. I find no merit in either contention.

At this late stage, no amount of words, however artfully put, will serve to get around the fact that these men in fact were discharged in November 1979. The Board so found after a comprehensive hearing and its decision was upheld on appeal. That is that; *res adjudicata*, as the General Counsel debates the matter. As to whether the Respondent in fact offered them unconditional and unequivocal reinstatement which Board law requires of all employers who violate this statute by discharging people, the ham letters simply fall short of what is required. Compare, as the General Counsel suggests: *Controlled Alloy*, 208 NLRB 882 (1974); *National Business Forms*, 189 NLRB 964 (1971); *Masonic and Eastern Star Nursing Home of D.C.*, 206 NLRB 789 (1973); *ABCO Engineering Corp.*, 201 NLRB 686 (1973); and *Issac and Vinson Security Services*, 208 NLRB 47 (1973). Decision here rests solely on the significant fact that the Company never told these two men clearly, directly, explicitly, that they in fact now had jobs after being fired. When an employer discharges a man in violation of the statute, it will not do to play games with words to avoid the entire effect of the wrongdoing, or to reduce the appropriate remedial cost. My finding does *not* rest on the General Counsel's collateral contention that the defense should be stricken from the Respondent's answer because it is "defectively asserted," because it is an attempt at "trial by ambush," because the December letters were "self serving," etc. Empty words are equally meaningless even when spoken by the prosecution.

3. I find equally unconvincing the Respondent's third argument, that because Maxey never told the Regional Director until 2 months before the hearing—in January 1982—that between December 1979 and July 1980 he had earned $3,530, he forfeited all rights to any reimbursement for lost earnings altogether.

Unable to find other, regular work at a number of different companies where he applied, from 1979 through July of the following year, Maxey did part-time painting work for a contractor friend in that business.[1] During the month of December, shortly after being fired, Maxey earned $120; during the next quarter he earned $1,770, and in the next 3 months $1,640.

In contrivance with his employer-friend he agreed that no money would be withheld from his earnings for income tax payment purposes. In September 1981, at the request of the General Counsel in preparation for this backpay proceeding, he signed a document listing all the companies at which he had futilely applied for work, but did not include the painting job where he did have substantial interim earnings. On second thought Maxey then filed an amended Internal Revenue Service income tax return, paid all taxes due, and, in January 1982, reported his earnings in full to the General Counsel. Thereupon the specifications were corrected accordingly.

Improper as this man's conduct may have been with respect to his statutory duty to pay his taxes like everybody else, I do not think his behavior in this respect sufficient reason to deprive him now of the make-whole remedy to which he is entitled under the Board's order. To start with, throughout the period of his employment as a painter, Maxey had no reason to be sure he would win his case before the Board, and therefore have any claim against the Respondent. As a dischargee he needed money and was earning much less than on the job from which he was unlawfully fired. By the time the initial Administrative Law Judge's Decision was issued, on June 30, 1980, his work as a painter was finished. But more important, although for a time he withheld the pertinent information from the General Counsel, he corrected his own deception by voluntarily coming forth with the requisite information before the hearing, 2 months earlier in fact. Cf. *Flite Chief*, 246 NLRB 407 (1979). If anyone had a right to be offended, it was the General Counsel, who offers his services free of charge to the charging party, and to every employee whose union files a charge on his behalf. There was no real deception against the Respondent, for the picture it was faced with at the hearing was correct in all respects. I do not mean to condone anybody's wrongdoing where payment of taxes is concerned, or even where honesty in their dealings with this Administrative Agency is concerned. But I think it a relevant factor, all things considered, that Maxey did, of his own volition, play it straight in the end.

4. A strong argument is made that Reszies did not make a reasonable diligent search for work and should therefore be awarded no backpay at all now. The words "reasonable" and "diligent" appear frequently in Board and appellate court decisions on this subject—i.e., the duty of a backpay claimant to seek work in order fairly to minimize the penalty justly to be paid by the employer. That the resultant test, or fair appraisal of the merits of the disagreement that always surfaces in these cases, involves nebulous, vague, always uncertain questions, is inevitable all the time. How much is reasonable? At what exact point can it be said "diligence" has been practiced? There is not, and there cannot be, a definitive test, or precedent, leading to an indisputable answer.

In the case at bar the issue is further blurred by a collateral argument of the Respondent made in support of the same contention—failure to look for work. Reszies did not earn 1 cent throughout the entire 7-1/2 months. In the end he returned to work for this Company when all the strikers came back. Considered apart from other related matters, the fact Reszies had no interim earnings certainly lends some support for an inference that he did not search. Albeit by implication, the Respondent carries this further, and reiterates its position originally spoken in the unfair labor practice proceeding, and it is that Reszies was never anything but a striker, like the others who walked the picket line with him, and not a dischargee at all. If you look upon the man as a striker, and couple that status with no interim earnings, the inference adverse to his claim now becomes more persuasive. But the Board has found that Reszies was in fact discharged, and no amount of talking can serve to change that finding of fact. Reszies' reported search for work—and he did go to many places without success—must be appraised, and credited, just like that of any discharged employee. *Abilities & Goodwill*, 241 NLRB 27 (1979).

After careful consideration of the record in its entirety, I find that the Respondent has not established the negative proposition—that Reszies did *not* make a reasonably diligent search for work. It must be remembered that the burden is on the Respondent to prove the negative by affirmative and convincing evidence. *NLRB v. Brown & Root*, 311 F.2d 447 (8th Cir. 1963). Reszies testified, and I have no reason not to believe him, that he went to and asked for work at each of the following companies: Southern Gravure, John Manville, Richmond Powder, Furniture Gravure, Transfertex Company, Filtrona, Phillip Morris, Western Electric, Nabisco, Caldwell, and Truxmore Industries. He went personally to all of these places, some several times. At some he filed applications, at others he did not because they would not accept them. He telephoned a number of them many times, always without results. Reszies also had his wife telephone some of these companies from time to time to inquire whether any openings had developed; always with negative results. Now, a number of very pertinent facts must be considered in connection with Reszies' failure to find work despite this comprehensive search. To start with, his only experience has been as a grinder, a

[1] At the hearing, Maxey testified, with precise detail, that he applied for work at no less than 14 different companies during the backpay period, always without success. With some he filed written applications, some he called on the telephone a number of times, some did not accept applications from him because there were no jobs, etc. He twice registered with the Virginia Employment Commission, still without success. He filed for unemployment compensation, but before the appropriate hearing could be held, he was working with the painting contractor and therefore let that matter drop. When all this affirmative evidence of a search for work is appraised together with the fact that Maxey did earn a substantial amount during the backpay period, it must be held that he did make the usual diligent and reasonable effort. The Respondent's attack on his credibility must fail. Indeed, after a representative of the Philip Morris Company testified, on behalf of the Respondent, that a search of that company's files showed no application by Maxey, there was offered into evidence a letter from that company to him showing that he had in fact been interviewed, without success!

relatively simple skill. There were many advertisements appearing in the local newspapers for skilled craftsmen of all kinds during the period in question. Reszies looked at the papers but did not apply for any of them. He knew his capacity as a workman was very limited, and therefore felt discouraged when he read the ads. And during the same period, in the same papers at times, the Respondent's ads for strike replacements were also appearing. This informed the public generally that a labor dispute was then in progress at the Respondent's plant. A man looking for work is normally asked where he last worked, and, I assume, also why he left the last place. With the newspapers publicizing the strike at the Respondent's place, and with Reszies having to tell the hoped-for employer where he came from, his chances of being hired would naturally be greatly reduced. True, he had personally been discharged, but when a prospective employer sees an applicant and knows he comes from a struck plant, he cannot be sure but that the man is a strong unioneer. This reality cannot be ignored in a proceeding of this kind.

As already stated, given the kind of question raised here, there will be aspects pointing the other way. The one which best seems to support the Respondent's position is the fact Reszies never went to the State's unemployment office for possible referral to one job or another. There are two sides to this coin also. The record indicates that in the State of Virginia a striker is not entitled to unemployment benefits. If Reszies was a dischargee, and therefore not a striker, why did he not go there if only to collect his money? But we are speaking of the period before any finding was made that Reszies was a dischargee and not a striker, as the Respondent was then contending. I must believe the Company would have taken that same position at any hearing on unemployment benefits. With 100 employees on strike at the plant, how was the unemployment office to know that this one man was not a striker, and therefore not entitled to anything? It could not know then, and in all probability would have treated him as just another of the overall group which was choosing to withhold its services and picketing instead. Withal, that office was just one of many places Reszies could have gone in his search but did not. Can his failure to do that be deemed, of itself, a willful failure to make a diligent search? I think not. In many of the cases cited in the Respondent's brief, such failure is coupled with other evidence of indifference by the claimant.

All this brings us back to the beginning. The claimant cannot be held to the highest standards of diligence in his search. And when there is doubt any uncertainty is resolved against the wrongdoer whose conduct made uncertainty possible. *Fiberboard Paper Products Corp.*, 180 NLRB 142 (1969). As the Board said in *United Aircraft Corp.*, 204 NLRB 1068 (1973), ". . . doubts should be resolved in favor of the backpay claimant rather than the respondent wrongdoer who is responsible for any uncertainty which may exist." I find, in the total circumstances of this case, that Reszies also made an honest and reasonable search for work, albeit without success, and is therefore entitled to the usual make-whole remedy.

5. This principle that uncertainty in backpay calculations must be resolved in favor of the man who suffered the wrong, applies precisely to the final issue raised by the Respondent. Why should Maxey and Reszies receive interest on that part of the money they would have earned which would never have come into their hands anyway, because the Company had to withhold some of it for direct payment to the State or Federal government for income taxes then due? A sufficient answer is, because there is no way of knowing how much the backpay now to be given the men will be subject to taxes, or at least at what rate it will be taxable. They will receive the cash in 1982 instead of 1980. But now they are working full time at regular salaries. Since they probably file their tax returns on a cash basis, as do most ordinary workmen, this means all of the belated payments will be subject to a much higher rate of taxation than would have been the case had their gross earnings each year remained regular. Should the Respondent now be ordered to pay each man for the additional monies they will have to pay in taxes as a direct result of the wrong done them? I think it best to leave this matter alone and stick to the Board's established practice.

In keeping with the foregoing, Maxey's gross backpay is reduced to $10,741.10 and Reszies to $10,416.88. Because Maxey had $3,530 in interim earnings, his net backpay due now is $7,211.10. As Reszies had no interim earnings, his net backpay due is $10,416.88.

On the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the National Labor Relations Act, there is hereby issued the following recommended:

ORDER

Inta-Roto Incorporated, its officers, agents, successors, and assigns, shall pay to each of the employees found above to be entitled to backpay awards the amounts set opposite their names in this Decision, with interest. *Florida Steel Corp.*, 231 NLRB 651 (1977).